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August 7, 2001

Arthur F. Rosenfeld
General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Re: American Institute of Physics, Case No. 5-CA-29366

Dear Mr. Rosenfeld:

We write to ask you to reconsider the Office of Appeals decision, dated June 29, 2001, refusing to issue a complaint in the above-referenced matter. Although we recognize that reconsideration is unusual, we think it appropriate here for two reasons. First, this case presents the type of circumstance where the protections of the Act are most needed.

Mr. Schmidt is an employee who banded together with his fellow employees to present their grievances to management. The June 29, 2001 response concludes that management's response violated the Act.¹ Mr. Schmidt is not supported by a large labor organization; his only recourse is the Board. Therefore, if the Board does not protect his rights, legal violations will go unremedied.

Second, we respectfully suggest that the conclusion, that Mr. Schmidt's discharge did not violate the Act, rests on three fundamental errors. Two principal findings of the Office of Appeals are not supported by the facts. In addition, the American Institute of Physics's ("Institute") newly stated reason for Mr. Schmidt's discharge presents a completely different story from the Institute's initial rationale and one to which Mr. Schmidt should be given an opportunity to respond.

The dismissal letter begins from the premise that Mr. Schmidt established a "*prima facie* case that [he] was discharged for engaging in protected concerted activities." Nonetheless, it concludes that the employer "met its *Wright Line* burden of establishing that it would have discharged Mr. Schmidt for his conduct relating to his book publishing in any event notwithstanding his role in protected concerted activities." In support of this finding, Ms. Dixon explains that "the evidence presented in support of . . . the [Institute's] alleged tolerance of other employees doing writing work for other publishers on company

¹ Specifically, the Office of Appeals acknowledged that "the evidence indicated that Jeff Schmidt engaged in extensive protected activity for over a decade, that the [Institute] had knowledge that Schmidt was engaged in such activity, and that the [Institute] bore animus towards Schmidt for engaging in such activity." The Office of Appeals also recognized that the Institute had made "threats of discipline and other retaliatory conduct in order to discourage employees from discussing working conditions with each other and informing the [Institute] of their collective concerns. . . ."

time was deemed distinguishable from the facts of the case on appeal.” *Id.* [emphasis added].

The “distinguishing” facts listed were: (1) the articles written by employees who were not fired were written some years ago and are not “reasonably contemporaneous with Mr. Schmidt’s discharge”; and (2) those articles, “unlike Mr. Schmidt’s book, appear to have some relationship to the field of physics.”

The first distinction would support a *Wright Line* defense only if the Institute’s policy of allowing its employees to pursue freelance projects on their free time had changed since the time in which Mr. Schmidt’s coworkers openly pursued freelance work without repercussion. In fact, there was no such change in the Institute’s policy; it never advised Mr. Schmidt or others that the academic workplace culture had changed and that outside writing on Institute time was now prohibited. Thus, this first distinction is a hollow one. The simple fact is that Mr. Schmidt was treated differently than others who wrote freelance works on company time, and the only credible reason for that differential treatment was his protected activity and management’s hostility toward it.

The second distinction is simply wrong as a matter of fact. Mr. Schmidt’s book centers on the field of physics, and even contains physics equations. It discusses the field of physics directly, unlike the articles by Mr. Schmidt’s coworkers, which do so only indirectly, if at all. The Institute knew that the book focused on physics, not only because they had the book, but also because they had read a review of Mr. Schmidt’s book by Spencer Weart, a division manager at the Institute, a physicist and respected historian of science. *Physics Today* magazine, the division of the Institute in which Mr. Schmidt worked, even included the book in its New Books list, which the magazine limits to books related to physics. Thus, Mr. Schmidt’s book does have a relationship to the field of physics. Since neither of the grounds for denying Mr. Schmidt’s appeal are valid, the decision should be reconsidered and Mr. Schmidt’s appeal should be granted.

Finally, the Office of Appeals’ reliance upon the Institute’s newly proposed rationale for discharging Mr. Schmidt is inappropriate because Mr. Schmidt has never been presented with such a rationale, and consequently has not had the opportunity to respond. The Institute now claims, more than six months after Mr. Schmidt’s discharge, that he was discharged for undercutting the Institute’s “efforts at enhancing employee productivity.” On the day of his discharge, however, the Institute told Mr. Schmidt that he was discharged because he had taken company time to work on a book.² The Office of Appeals’ letter was the first document that Mr. Schmidt or his counsel received stating this new rationale. In these circumstances, it is clear that this rationale is an afterthought and should be viewed as pretextual.

² The Institute gave that same explanation to Mr. Schmidt’s coworkers, to the State of Maryland Department of Labor, and to the Chronicle of Higher Education.

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For these reasons, we respectfully request the General Counsel to reconsider Mr. Schmidt's appeal and order Region 5 to issue a complaint in the above-referenced matter.

Very truly yours,



Kirsten L. Doolittle

cc: Jeff Schmidt
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